

Supreme Court, U.S.

FILED

FEB 13 1991

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(2)

No. 90-1002

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

RICHARD G. KASCHAK

Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF KERN

Respondent.

PINE MOUNTAIN CLUB PROPERTY
OWNERS ASSOCIATION,

Real Party in Interest.

RESPONDENT'S REPLY TO
PETITION FOR WRIT OF CERTIORARI

B.C. BARMANN

County Counsel

ROBERT D. WOODS

Chief Deputy-Litigation

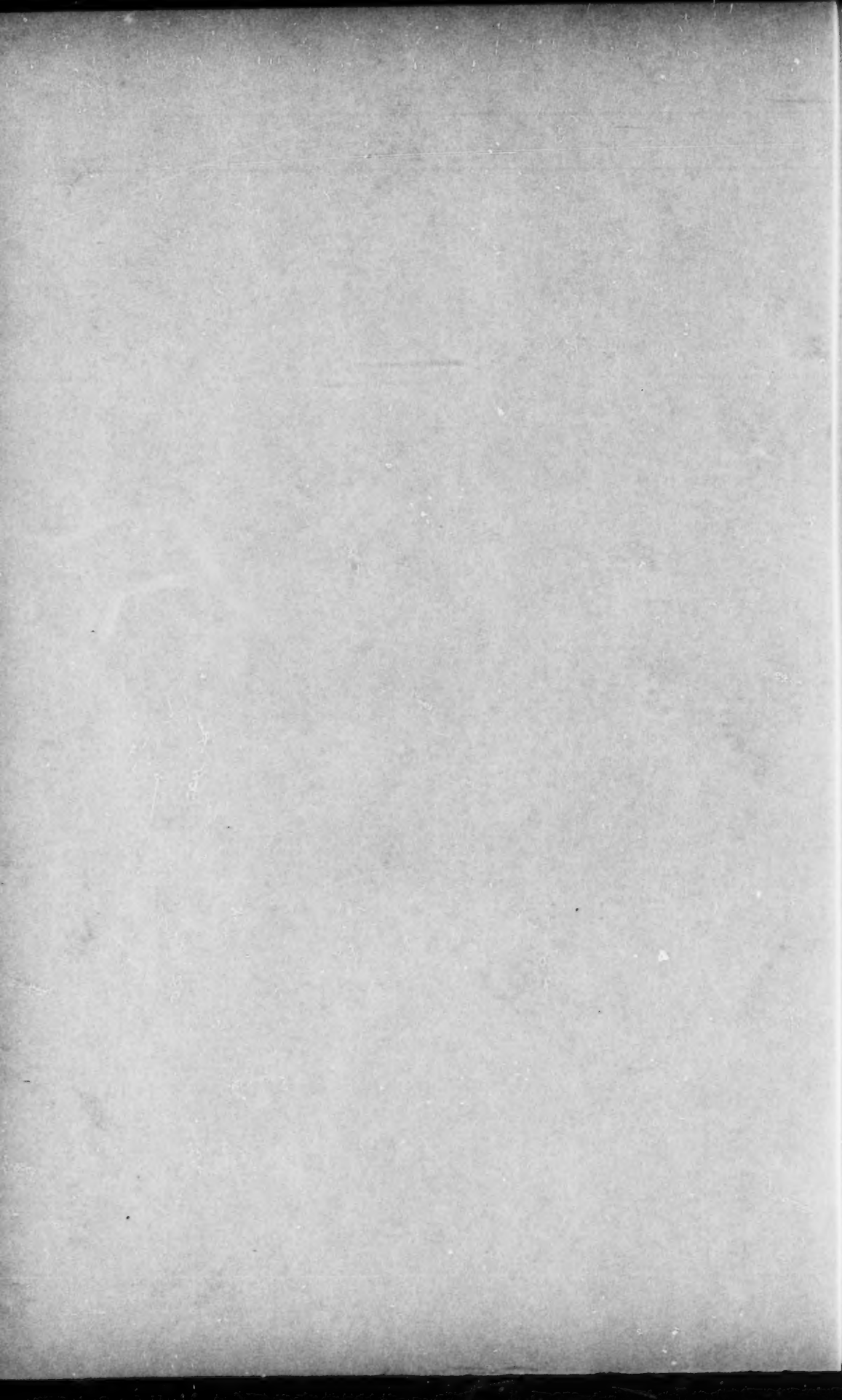
Counsel of Record

1415 Truxtun Avenue, 5th Floor

Bakersfield, California 93301

(805) 861-2326

Attorney for Respondent,
SUPERIOR COURT OF CALIFORNIA



I.

SUMMARY OF ARGUMENT

Petitioner Kaschak seeks a Writ of Certiorari on the constitutional grounds of claimed due process violations. Petitioner asserts these defects in the original proceedings in the Taft-Maricopa Justice Court of Kern County, in the Kern County Superior Court (sitting in its appellate function), and as to denial of the Petitions for review by the California Court of Appeal, Fifth Appellate District, and the California Supreme Court.

This reply is made by respondent County of Kern on behalf of the Taft-Maricopa Justice Court (now known as West Kern Municipal Court), and the Appellate Division of the Kern County Superior Court. This reply will address

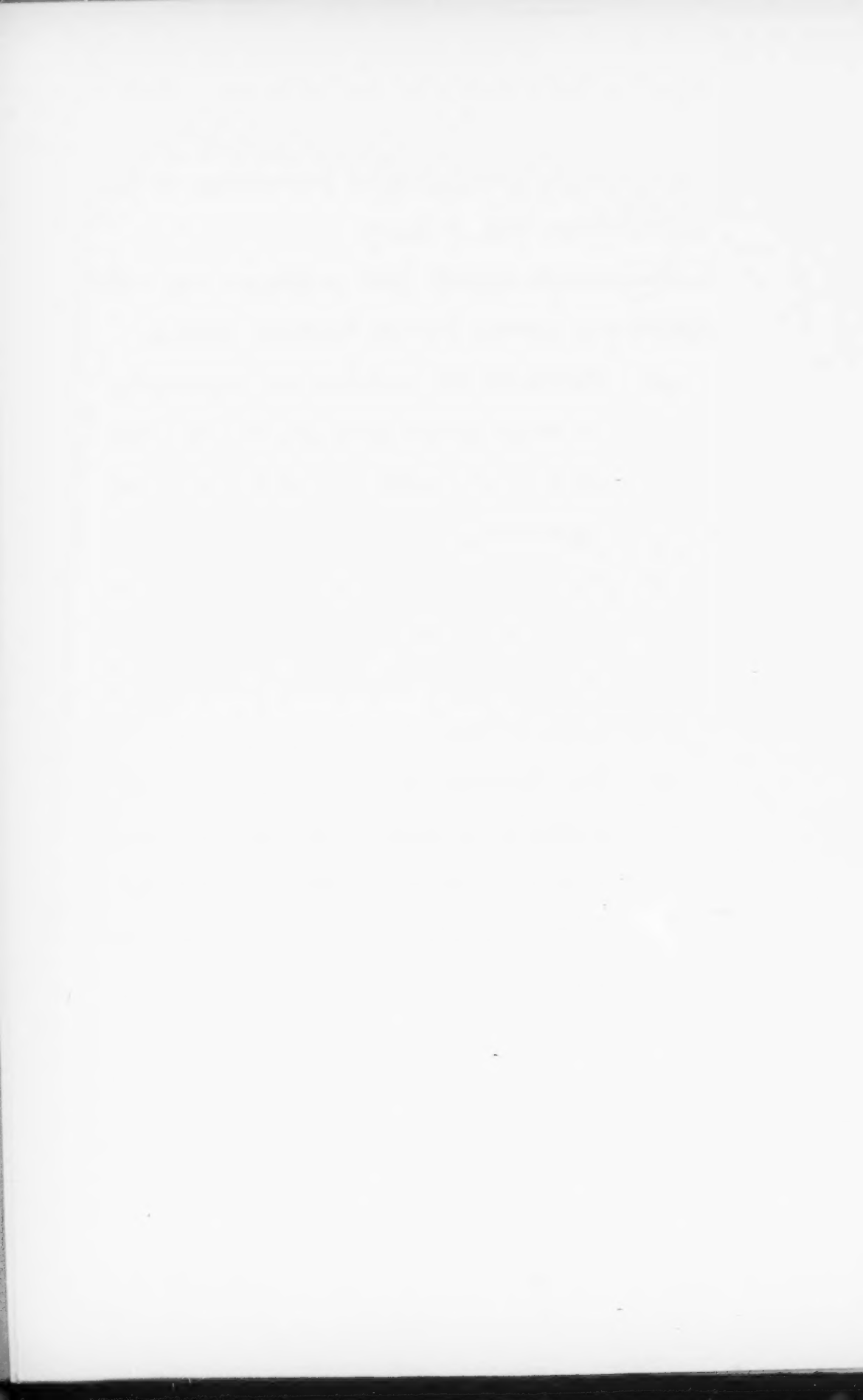
the propriety of the original proceedings in the Taft-Maricopa Justice Court.

Respondent asserts that petitioner was not denied due process for the following reasons:

- (1) Petitioner was provided the opportunity to cross-examine adverse witnesses, but failed to avail himself of that opportunity;
- (2) the justice court has full discretion under California rules of evidence to hear or refuse to hear oral testimony on motions; and
- (3) the declarations relied upon by the justice court were not properly objected to or stricken by petitioner's motion and must therefore be deemed to be competent evidence.

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II.

STATEMENT OF CASE

This action is based upon a civil suit filed in the Taft-Maricopa Justice Court by co-respondent Pine Mountain Club Property Owners Association (hereafter, "the Association"). The Association sued petitioner Richard G. Kaschak for his failure and refusal to pay an increase in the dues assessed to owners of property in the Pine Mountain Club, a private rural residential venture located near Frazier Park, California. The case was decided in favor of the Association, and a judgement was entered in the amount of \$11,815.49.

Petitioner's property in the Pine Mountain Club was attached as payment of the judgment. In order to satisfy the judgment against him,



petitioner was ordered to post a bond in an amount equal to twice the judgment or, in the alternative, a writ of sale for the property was to be undertaken.

Petitioner claimed he had a Homestead exemption to the seizing of his property, pursuant to California Code of Civil Procedure section 704.920. The Association filed a Motion to Invalidate the Homestead Application and Application for Order of Sale of Defendant's Dwelling on July 19, 1988. The Motion was originally scheduled to be heard on August 15, 1988.

A copy of the Notice and Motion was filed with the Court and served upon petitioner. The Association attached the Declarations of Debra Tibson Lambrec, attorney for the Association, Mel McColloch and Richard McMillan to the Notice and Motion.



Mr. McMillan was a part time resident of the Pine Mountain Club, and his property was located across the street from petitioner. His declaration was submitted as evidence that petitioner did not reside at his Pine Mountain property on a full time basis.

Mr. McCulloch was the chief operating officer of the Association. His declaration gave evidence that petitioner did not use his Pine Mountain Club address to receive mail and had an address in Hollywood, California.

On August 4, 1988, the hearing was continued to September 12, 1988. Petitioner filed his Opposition to Plaintiff's Motion to Invalidate Homestead on September 7, 1988. Petitioner did not request an opportunity to cross-examine the witnesses who had submitted declarations as evidence in the Association's Motion.



III.

PETITIONER WAS NOT DENIED DUE PROCESS OF LAW

Petitioner's claim that he was denied due process in the original hearing is based on the fact that witnesses were not present at the hearing on the Invalidation of the Homestead Claim.

The hearing was duly noticed by the Association and filed with the Taft-Maricopa Justice Court on July 19, 1988, and served upon petitioner.

The reception and consideration of evidence, including oral evidence, in a Law and Motion Hearing is governed by California Code of Civil Procedure section 2009 and the California Rules of Court. Rule 323 states in relevant part as



follows:

"Evidence received at a law and motion hearing shall be by declaration and affidavit and by request for judicial notice without testimony or cross-examination, except as allowed in the court's discretion for good cause shown or as permitted by local rule. A party seeking permission to introduce oral evidence, except for oral evidence in rebuttal to oral evidence presented by the other party, shall file, no later than three court days before the hearing, a written statement setting forth the nature and extent of the evidence proposed to be introduced and a reasonable time estimate for the hearing..."

Petitioner was aware that there were witnesses against him upon receipt of the Notice of Motion, Motion, and attached Declarations. In his opposition, petitioner attacked the declarations as hearsay but did not seek permission from the justice court at that time or at any time before the hearing to cross-examine the witnesses. Petitioner received the declarations and had ample time to review the declarations and pursue cross-examination. He



did not comply with the procedures set forth in Rule 323(a) for requesting that plaintiff's bring their witnesses to the hearing for the purpose of cross-examination.

The procedures embodied in Rule 323 are authorized by California Code of Civil Procedure section 2009. That section provides in relevant part as follows:

"An affidavit may be used . . . upon a motion, and in any other case expressly permitted by statute."

Section 2009 has been construed by California courts as empowering any court to determine motions upon declarations alone and to allow the court discretion to refuse oral testimony. Beckett v. Kaynar Mfg. Co. (1958) 321 P.2d 749, 49 Cal.2d 695, 698, n. 3.

California courts have also considered the argument raised by petitioner that reliance on declarations alone to determine motions denies

parties the right to cross-examine adverse witnesses.

California courts have consistently and uniformly rejected this argument.

In the matter of Conservatorship of Jones (1986) 188 Cal.App.3d 306, 232 Cal.Rptr. 600, a California trial court obtained jurisdiction over Jones by the service of a petition for conservatorship on Jones. The court relied on an affidavit of the social worker who had served the petition to determine that service was proper. Jones objected and contended that he should have been allowed to cross-examine the social worker at his conservatorship hearing.

The appellate court responded to Jones's due process argument as follows:

"Jones's claim of an impaired right to cross-examine the affiant does not dissuade us from this conclusion. The due process protection adhering in the Sixth Amendment is '. . . a personal examination



"and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury, in order that' they may look at him, and judge by his demeanor upon the stand, and the manner in which he gives his testimony, whether he is worthy of belief. (Mattox v. United States (1895) 156 U.S. 237, 242-43; accord Ohio v. Roberts (1980) 448 U.S. 56, 63-64; California v. Green (1970) 399 U.S. 149, 157, 158."

Jones, 188 Cal.App.3d at 310. The Jones court went on to hold that Jones had cited no authority that the Sixth Amendment protection offered to criminal defendants extended to proposed conservatees. Id.

Petitioner would have this Court substitute "civil litigant" for "the accused" in the above quotation. Not surprisingly, petitioner cites no authority for his novel proposition.

Further, the cases cited by petitioner in his petition before this Court serve to cut his own



legal throat.

The cases of Goldberg v. Kelly (1970) 397 U.S. 254; Derewecki v. Pennsylvania Railroad Co. (3d Cir. 1965) 353 F.2d 436; Nevels v. Hanlon (8th Cir. 1981) 656 F.2d 372; and Chicago Ridge Theatre Ltd. Partnership v. M&R Amusement Corp. (7th Cir. 1988) 855 F.2d 465 all stand for the proposition that a litigant must have an opportunity to cross-examine adverse witnesses.

As shown above, petitioner was provided that opportunity by Rule 323. Petitioner chose not to avail himself of that opportunity, and his claims of due process violation must be deemed waived.

The justice court reviewed the moving papers of both parties, including the declarations submitted by plaintiffs, as well as hearing oral argument at the hearing and made its order

stating:

"Evidence both oral and documentary being submitted and arguments heard thereon the court finds as follows:

1) That there is an overwhelming amount of evidence indicating that the defendants' dwelling in Pine Mountain was not used as his principle place of residence which is one of the essential elements concerning a homestead exemption and the court finds that under C.C.P. 704, et seq, that defendant's homestead declaration is invalid."

It was clearly within the justice court's discretion to weigh the evidence as presented. In this instance the justice court felt the evidence in support of plaintiffs' position was "overwhelming."

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IV.

DECLARATIONS WERE PROPERLY RELIED UPON BY JUSTICE COURT IN DETERMINING MOTION

Petitioner further claims that he was denied due process in that the justice court relied upon hearsay declarations in determining the motion.

Although petitioner attacked the declarations as hearsay, he made no objection to the declarations or a proper motion to strike.

The court in Flood v. Simpson (1974) 45 Cal.App.3d 644, 675, 119 Cal.Rptr. 675 addressed and rejected the same argument raised by petitioner. The appellate court stated that it is well-settled that hearsay or other incompetent evidence in an affidavit, if received without proper objection or motion to strike, is



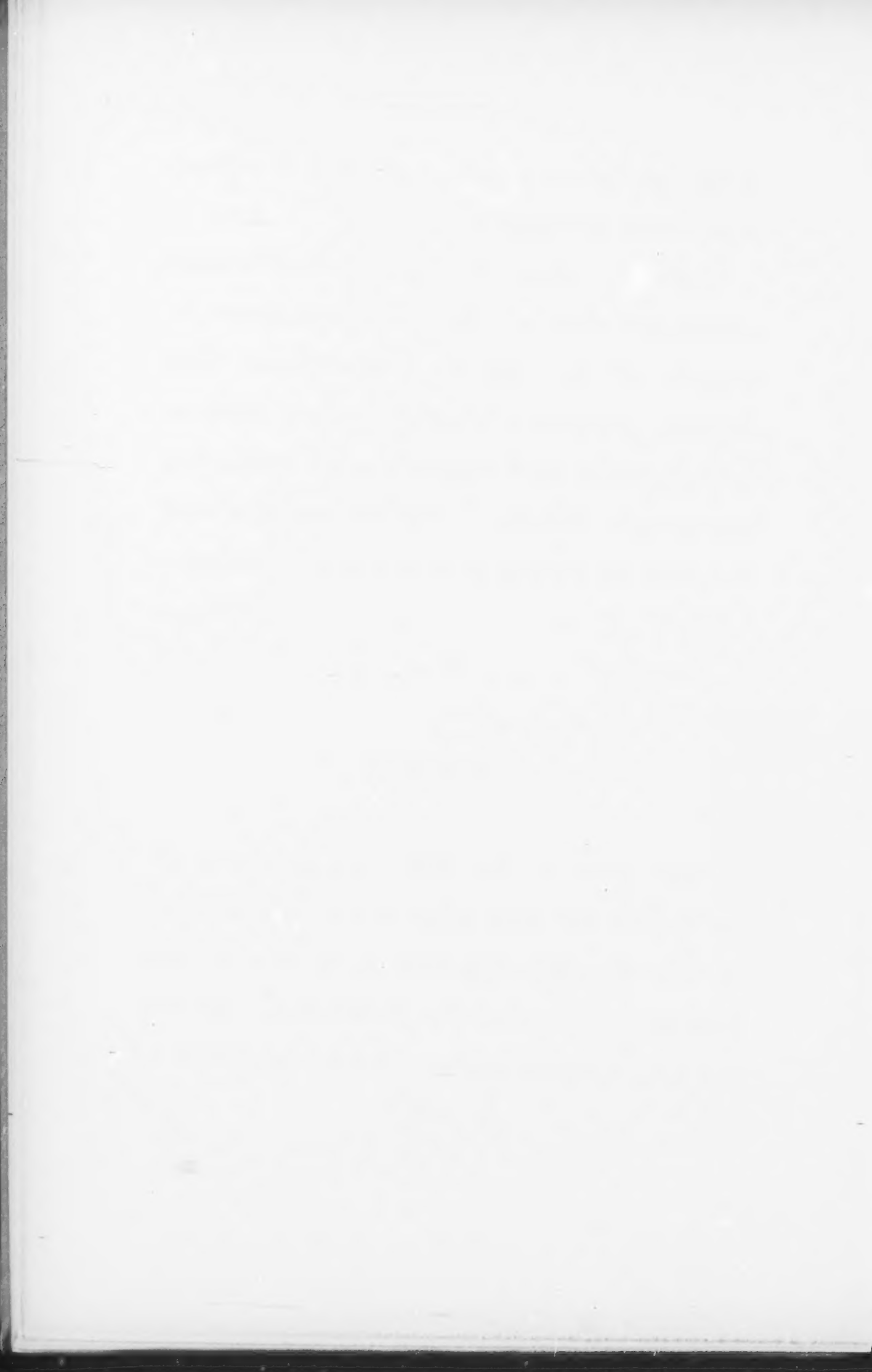
to be regarded as competent evidence in support of an order or judgment.

Similarly, even if this Court accepts petitioner's assertion that the declarations in support of the justice court's order were hearsay, petitioner's failure to properly object or move to strike such declarations at the hearing waived any defects. The declarations must therefore be deemed to be competent evidence.

V.

CONCLUSION

The Petition for Writ of Certiorari is petitioner's last ditch effort to save his property in Pine Mountain from sale in payment of the judgment rendered by the justice court. He has appealed to every court, including this Court in



a prior Petition for Writ of Certiorari, Supreme Court No. 87-2106, in the October 1988 term. The Petition was denied.

In his first Petition before this Court, petitioner failed to effectively raise the issue of right to cross-examine as an element of due process. Similarly, petitioner failed to seek the chance to cross-examine the witnesses against him during the hearing of the motion. This consistent lack of timely action has plagued petitioner. He seeks once again the indulgence of this Court for the airing of weak excuses for his own failure to adequately undertake his own advocacy.

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Respondent respectfully requests that this
Court deny the Petition for Writ of Certiorari.

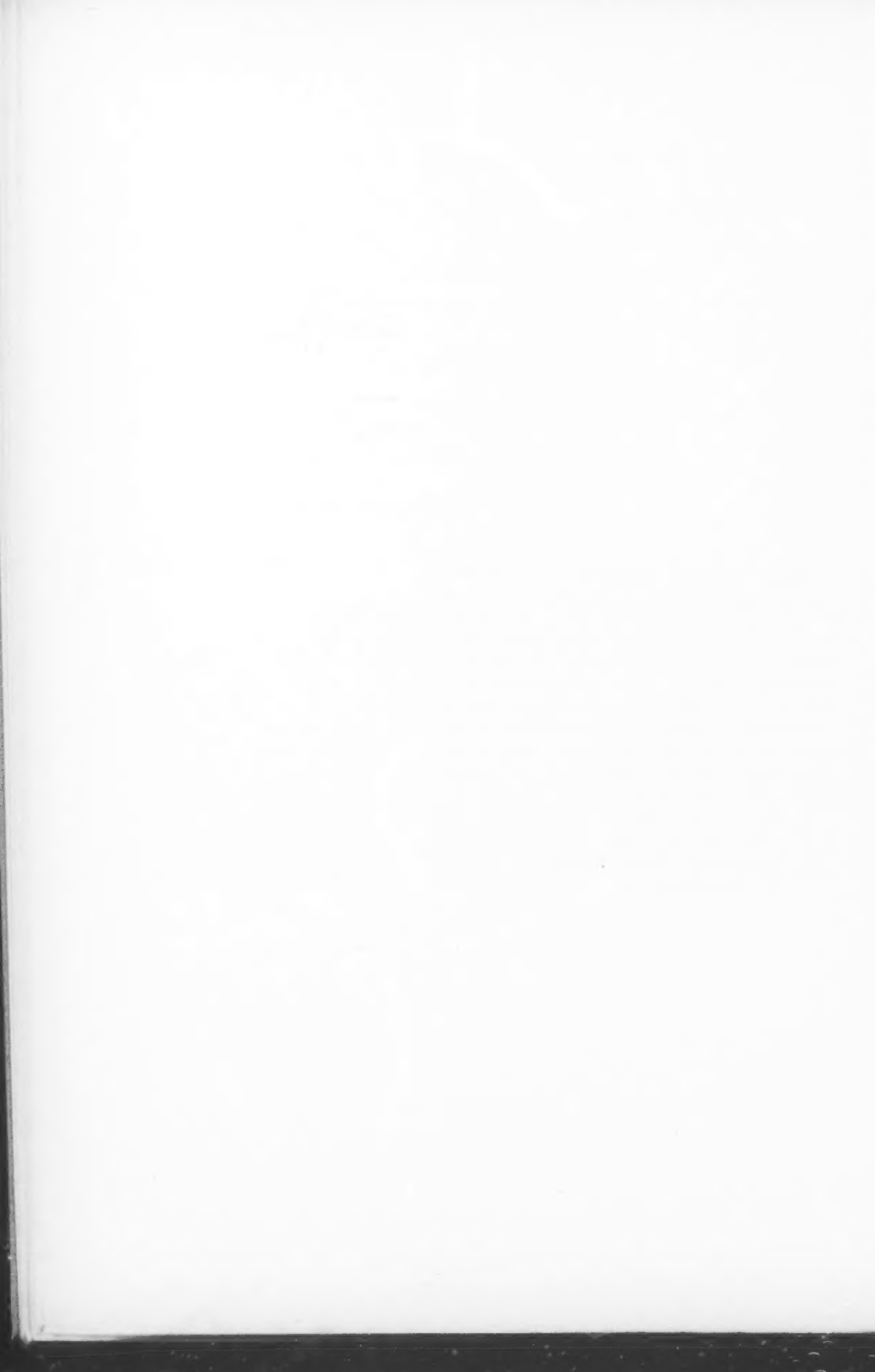
Respectfully submitted,

B.C. BARMANN
County Counsel
ROBERT D. WOODS
Chief Deputy-Litigation
Counsel of Record

Attorneys for Respondent,
COUNTY OF KERN



§ 2009. [Use of affidavits.] An affidavit may be used to verify a pleading or a paper in a special proceeding, to prove the service of a summons, notice, or other paper in an action or special proceeding, to obtain a provisional remedy, the examination of a witness, or a stay of proceedings, and in uncontested proceedings to establish a record of birth, or upon a motion, and in any other case expressly permitted by statute. [1872; 1927 ch 242 § 1; 1929 ch 493 § 1; 1943 chs 11 § 1, 821 § 2; 1965 ch 299 § 124.] *Cal Jur 3d Actions* § 49, *Affidavits and Declarations Under Penalty of Perjury* §§ 30-32, *Decedents' Estates* § 1066, *Motion*



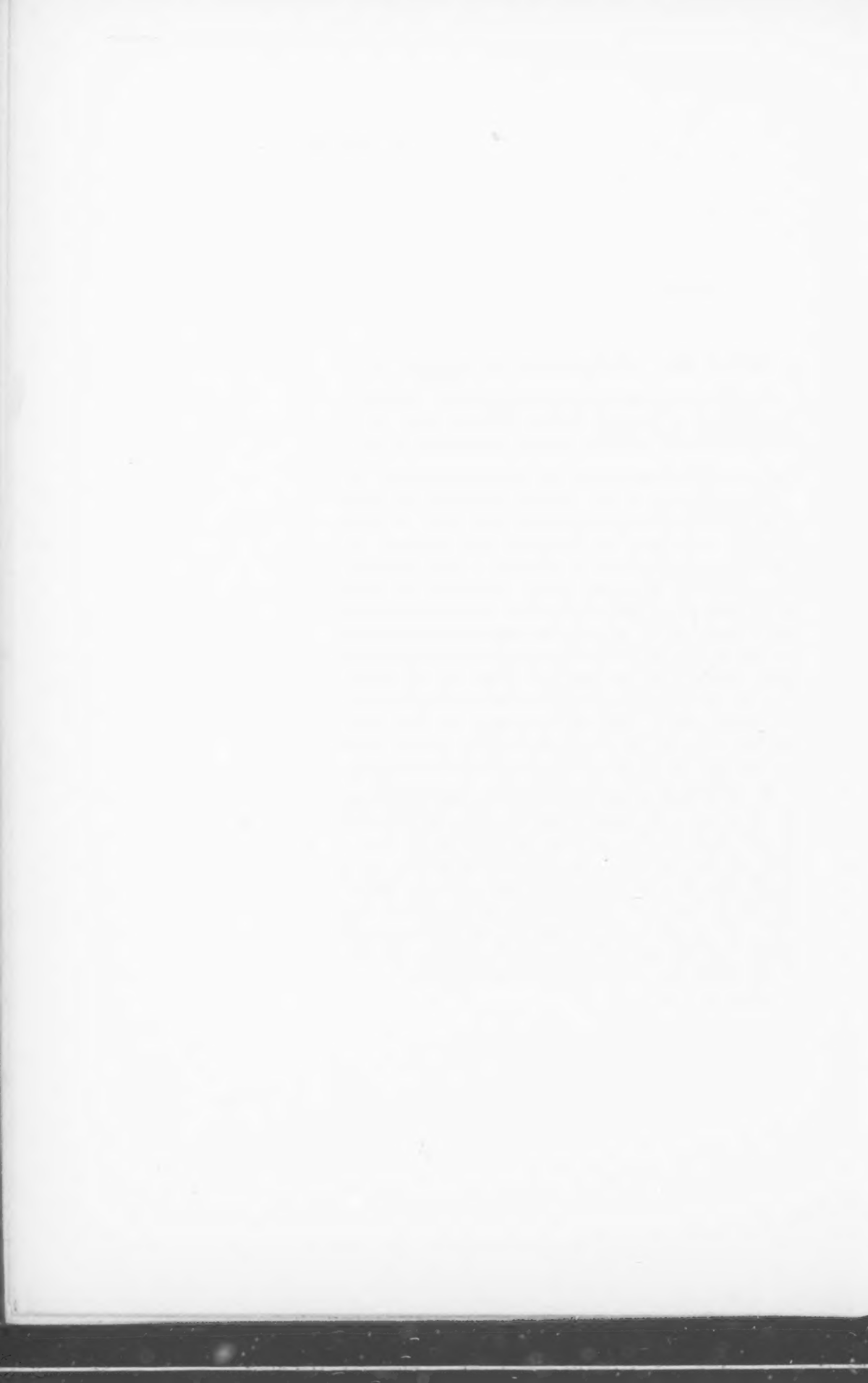
RULE 323. EVIDENCE AT HEARING

(a) [Restrictions on oral testimony] Evidence received at a law and motion hearing shall be by declaration and affidavit and by request for judicial

notice without testimony or cross-examination, except as allowed in the court's discretion for good cause shown or as permitted by local rule. A party seeking permission to introduce oral evidence, except for oral evidence in rebuttal to oral evidence presented by the other party, shall file, no later than three court days before the hearing, a written statement setting forth the nature and extent of the evidence proposed to be introduced and a reasonable time estimate for the hearing. When the statement is filed less than five court days before the hearing, the filing party shall serve a copy on the other parties in a manner to assure delivery to the other parties no later than two days before the hearing.

(b) [Judicial notice] A party requesting judicial notice of material under Evidence Code sections 452 or 453 shall provide the court and each party with a copy of the material. If the material is part of a file in the court in which the matter is being heard, the party shall (1) specify in writing the part of the court file sought to be judicially noticed; and (2) make arrangements with the clerk to have the file in the courtroom at the time of the hearing.

[Source: New]



FILED

MARICOPA TAFT JUSTICE COURT
COUNTY OF KERN, STATE OF CALIFORNIA

Maricopa Taft Justice Court
County of Kern, State of California
Date... 12-14-88
By... Paul M. Ladd
Clerk

Pine Mountain Club Property
Owners Association, Inc.,

Plaintiff,

vs

Richard G. Kaschak

Defendant.

Case No. CJ 193

Rulings of the Court

Re: 1) Plaintiff's Motion to
Invalidate Homestead and

2) Application for Order of
Sale of Defendant's Dwelling

This cause having come on regularly to be heard the 28th day of October 1988, plaintiff appearing by and through their legal representative Art Santana and defendant appearing in propria persona.

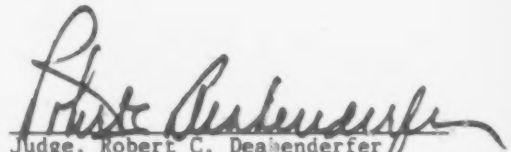
Evidence both oral and documentary being submitted and arguments heard thereon the court finds as follows:

1) That there is an overwhelming amount of evidence indicating that the defendant's dwelling in Pine Mountain was not used as his principle place of residence which is one of the essential elements concerning a homestead exemption and the court finds that under CCP704 et seq, that defendant's homestead declaration is invalid.

The court further rules on the application for an order concerning the sale of defendant's property in the affirmative and as follows:

Defendant, Richard G. Kaschak shall file an undertaking double the amount of judgment or in the alternative a surety bond one and one half times the amount of plaintiff's judgment within 30 days: that if no undertaking or bond is filed herein plaintiff shall proceed with the sale of defendant's property as prayed for in their application. Order of sale pursuant to CCP701.510.

Dated: 12/14/88


Judge, Robert C. Deahenderfer